No. 344

Supreme Court of the United States

October Term—1933

PUGET SOUND POWER & LIGHT COMPANY, a corporation,

Appellant,

vs.

THE CITY OF SEATTLE, a municipal corporation,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

Brief of Appellant

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

Brief of Appellant

I.

OPINION OF THE COURT BELOW.

The final opinion of the Supreme Court of the State of Washington in this case is reported in *Puget Sound Power & Light Company, a corpora-*

tion, appellant, vs. The City of Seattle, a municipal corporation, respondent (72 Wash. Dec. 519). The opinion is printed in the record (R. 38). Appellant's petition for rehearing was denied June 14, 1933 (R. 62).

The letter "R" wherever used in this brief indicates a reference to the printed transcript of the record.

II.

JURISDICTION

The appellant refers to the Statement as to Jurisdiction, which is a part of the record and printed separately.

III.

ORDINANCE OF THE CITY OF SEATTLE INVOLVED IN THIS APPEAL

The validity of Ordinance No. 62,662 of the City of Seattle, Washington, a municipal corporation, is involved in this case (R. 18). The pertinent provisions thereof are as follows:

"ORDINANCE NO. 62662

AN ORDINANCE relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. EXERCISE OF REVENUE LICENSE POWER: The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue.

Section 2. DEFINITIONS: In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied:

GROSS INCOME: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

. . . . . .

Section 3. 'OCCUPATION LICENSE' REQUIRED: After the 1st day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an 'Occupation License.'

Any person engaging in, or carrying on, more than one such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in or carries on, any business subject to tax hereunder without having his 'Occupation License' so to do, shall be guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

Section 5: OCCUPATIONS SUBJECT TO TAX—AMOUNT: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by

the application of the rates against gross income, as follows:

(a) . . . . . .

(b) . . . . . .

(c) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power a fee or tax equal to three per cent. (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year.

. . . . . .

Section 6. CITY OF SEATTLE SUBJECT TO TAX: Subdivisions (b) and (c) of Section 5 shall, so far as permitted by law, be applicable to the City of Seattle, except that said City shall not, as a tax payer, be required to conform to the other provisions of this ordinance.

. . . . . .

Section 15. TAXPAYER TO KEEP BOOKS AND RECORDS—RETURNS CONFIDENTIAL: It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books

or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the City Comptroller, pursuant to this ordinance, shall not be made public, nor shall they be subject to the inspection of any person except the Mayor, the Corporation Counsel, the City Comptroller, or his authorized agent, and members of the City Council.

Section 16: COMPTROLLER TO INVESTIGATE RETURNS: If any taxpayer fails to apply for license or make his return, or if, the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements, as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or

said officer, or his authorized agent, may fix a time and place for an investigation of the correctness of the return and may issue a subpoena to the taxpayer, or any other person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpoena, require him, or any person, to bring with him such books, records and papers as may be necessary.

. . . . . .

Section 24. PENALTY: Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the City Jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment."

IV.

STATEMENT OF THE CASE

Appellant is a privately owned public utility corporation engaged in the business of generating, distributing and selling electric light and power

in the City of Seattle, Washington. Appellee is a municipal corporation organized under the laws of the State of Washington. It will be referred to herein as appellee and/or "the city".

By its foregoing ordinance No. 62,662 effective from July 1, 1932, for revenue purposes only, the city asserted the right to impose upon appellant an annual license tax in the amount of three per cent of appellant's total gross income from its electric light and power business in said city.

To reduce to a minimum the risk of the drastic penalties of said ordinance and to enable appellant to lawfully contest the constitutional validity thereof as enacted and the validity thereof in its application to appellant, under written protest, appellant attempted to make a valid return of its gross income in conformity with the requirements of the ordinance. In its protest appellant asserted that it was unable to determine with any degree of certainty the meaning of "gross income" as defined by the ordinance or the manner by which gross income as thus defined could be ascertained (R. 8, 27).

Under the return made by appellant, if the ordinance were valid and enforcible against it, and if appellant had correctly guessed at the meaning

of the term "gross income" as defined by the ordinance, there would have been due to the city from appellant for such license tax for the twelve months period ending June 30, 1933, the sum of $116,363 payable in twelve monthly installments of $9,697.75 each. Under written protest appellant paid the first monthly installment of $9,697.75 and thereupon promptly filed the instant suit, alleging (in its amended complaint) two causes of action (R. 1).

By its first cause of action appellant sought recovery of the sum of $9,696.75, which under protest it had paid as the first monthly installment of the tax. By its second cause of action appellant sought to restrain any attempt by the city to enforce said ordinance or any part thereof against appellant.

The issues were determined in the trial court upon a demurrer of the city to appellant's amended complaint (R. 34). The facts alleged in the amended complaint will be subsequently stated. The trial court sustained the city's demurrer and entered a judgment dismissing appellant's causes of action. From this judgment of dismissal appellant appealed to the Supreme Court of the State of Washington.

A majority of the Supreme Court of the State of Washington in an opinion filed April 21, 1933,

affirmed the judgment of dismissal entered by the trial court (R. 38). Appellant thereupon filed its petition for a rehearing, which on June 14, 1933, was denied (R. 62). On said date judgment of affirmance was entered in the Supreme Court of the State of Washington. On June 19, 1933, the appeal herein was allowed (R. 67).

In its amended complaint appellant alleged, the city by its demurrer admitted, and the Supreme Court of the State of Washington in its opinion recognized the following facts:

Appellant Is Engaged in the Light and Power Business

Appellant, Puget Sound Power & Light Company, is a privately owned Massachusetts corporation which is qualified to do business in the State of Washington, including the City of Seattle. For many years appellant, as a public utility corporation, has been and now is actively engaged in the business of selling and furnishing electric light and power, within the definition thereof contained in the foregoing ordinance No. 62,662 of the City of Seattle (R. 1).

Appellant is the lawful owner and holder of a franchise known as the "Shuffleton Franchise"

which was granted by the city under its ordinance No. 7894 dated March 12, 1902. By said franchise for a period of fifty years expiring March 14, 1952, appellant was granted:

> "the right, authority and franchise, on the conditions and for the considerations in this ordinance expressed, to construct, maintain and *operate* equipment and apparatus for an underground electric system, and to erect and maintain poles, wires and appurtenances for the distribution of electric light, heat and power in, over and under the streets, alleys and public places of the City of Seattle. This right, authority and franchise is intended to apply to all streets, alleys and public places of said city, now or hereafter existing, subject to the terms and conditions hereinafter expressed; and said grantee, his successors and assigns, by accepting this ordinance covenant that within three years from the approval of this ordinance, he or they will have *in operation* a system extending to all streets and parts of streets now lighted by electricity; . . ."

By the terms of said franchise it is provided that same is subject to repeal or modification only "if the franchise granted hereby is not *operated* in accordance with the provisions of this ordinance or at all" (R. 3, 4).

The grantee accepted said franchise on March 27, 1902, and strictly in compliance with its terms and conditions, appellant and/or its predecessor in

interest constructed and acquired power plants and extensive distribution facilities for the purpose of selling and furnishing electrical energy for light and power purposes to the public. Continuously since the grant of said franchise appellant has maintained and operated and is now maintaining and operating said plants and facilities under said franchise for such purposes (R. 4).

As a privately owned public utility corporation appellant is required by the laws of the State of Washington to pay city, county and state property taxes upon all of its property in the City of Seattle, including its franchise granted by the city (R. 2).

Being a privately owned public utility corporation, as to its rates, rules, regulations and earnings, appellant is subject to the sole and exclusive regulation of the State of Washington (Remington's Revised Statutes of Washington, § 10362), which exercises such jurisdiction through the Department of Public Works of the State of Washington. The city does not have power to regulate appellant's business in the City of Seattle or to fix the rates to be charged for the electrical energy sold by appellant in the city. Under the laws of the State of Washington the city has no authority to permit or

to require appellant to cease doing business in the City of Seattle (R. 2).

The City Is Engaged in the Light and Power Business.

The city, as a municipal corporation, in a proprietary capacity and for profit, is also engaged in the business of selling and furnishing electric light and power in the City of Seattle within the definition thereof contained in its Ordinance No. 62,662. In such business the city is in direct and active competition with appellant (R. 2).

The city's venture in said proprietary business began in the year 1902 when by ordinance it authorized the issuance and sale of general lien bonds in the amount of $590,000 for the purpose of constructing or purchasing a plant or system for furnishing light and power to the public. Thereafter, from time to time other similar general lien bonds to finance the expansion of its electric light and power business were issued and sold by the city. The principal amount of all of such general lien bonds which were outstanding and unpaid on December 31, 1931, was approximately $1,447,000. Such general lien bonds are payable out of the city's tax supported funds (R. 5).

The major development of its extensive commercial light and power business, however, was financed through the issuance and sale by the city of revenue bonds which are obligations against only the gross revenues received by it from the sale of electric light and power to the public for hire. Such gross revenues of the city are by the laws of the State of Washington (Remington's Revised Statutes of Washington, 9491), the ordinances of the City of Seattle authorizing same, and by the expressed terms and conditions of each of said bonds, pledged to the payment of the principal thereof and any interest due thereon. Such pledge constitutes a charge upon such gross revenues "prior and superior to all other charges whatsoever, including charges for maintenance and operation" (R. 5, 6).

The first issue of such revenue bonds of the city was sold to the public in the year 1917. The total amount of such bonds sold since 1917 and the total amount that has been paid by the city out of the gross revenues received by it from its proprietary light and power business, for interest and to apply upon the principal of such bonds, are not shown by the record. It is alleged and conceded that at the time the instant suit was initiated the total principal amount of such outstanding and unpaid

revenue bonds was $32,852,000. The profits of the city from its proprietary electric light and power business are the sole source of the funds available for payment of the principal of these revenue bonds and any interest due thereon (R. 6).

Being a municipal corporation, under the laws of the State of Washington the city does not pay any city, county or state property taxes upon any of the property owned by it, whether same is used in its governmental capacity or in its proprietary business of selling electrical energy for profit (R. 2).

Being a municipal corporation, under the laws of the State of Washington, the city is not subject to regulation of any kind or character by the State of Washington or its Department of Public Works. The city has sole and exclusive power to fix and determine the rates at which it sells electric light and power to its customers, which power, under the charter of the city, is vested solely in its City Council (R. 2).

The city in its proprietary capacity annually sells to itself in its governmental capacity all of the electric light and power used for lighting the public streets of the City of Seattle and for other municipal and governmental purposes. The rates which

the city charges itself for such service are arbitrarily fixed and determined by its City Council without regard to the price at which such service could be purchased in the open market. To pay itself for such electrical energy the city transfers money from its General Fund (which is tax supported) to its City Light Fund, which is the fund of the city into which is paid all of its gross revenues from its proprietary light and power business. The amount of such payments is now in excess of $138,000 annually (R. 3).

Under the laws of the State of Washington the city may appropriate appellant's property by condemnation. As a condition precedent to such an appropriation the city is required to pay appellant the fair market value of the property appropriated (Remington's Revised Statutes 8966 (6), 9215, 9488).

The Competition Between Appellant and the City is Direct and Active

The competition between appellant and the city is as direct and active as it is possible for any competition in the same business to be. In the City of Seattle purchasers desiring electric light and power may receive same only from appellant or

the city. The city is actively seeking new customers and is continuously engaged in the solicitation of customers of appellant in an effort to persuade them to become customers of the city. The city actively exercises every coercive power at its command to increase the number of its customers to a maximum and to reduce the number of appellant's customers to a minimum (R. 2, 3).

The same rates are charged by the two competing utilities. If appellant charged a higher rate than is charged by the city, appellant would lose all of its customers. If the rates fixed and determined by the city do not permit appellant to earn a reasonable return or even any return upon the value of its property which is dedicated to the public use in the City of Seattle, appellant has no remedy. Application to the Department of Public Works of the State of Washington for authority to charge a higher rate could bring no relief to appellant. While that department may authorize appellant to increase its rates, it may not require the city to do so. The city, by reason of its competition in such business, in which it is engaged in a proprietary capacity and for profit, in fact definitely and permanently controls both the gross and the net income of appellant (R. 2, 3). ——

The city has not increased its rates since July 1, 1932, the effective date of its said ordinance No. 62,662 (R. 10).

In Fact and in Law the City is Not Subjected to the Tax Prescribed in Its Ordinance No. 62,662.

Even though section 6 of the ordinance provides that subdivision 5 (c) thereof (which imposes the tax upon appellant) shall "so far as permitted by law be applicable to the City of Seattle," the truth is that both in fact and in law the ordinance tax is not imposed upon the city. Although for profit and in a proprietary capacity the city is engaged in the light and power business in the City of Seattle in all respects the same as appellant is engaged in said business, the burden of the ordinance tax is imposed only upon appellant. In fact and in law appellant's competitor is not subjected to said excise tax imposition (R. 8, 9).

In this appeal there is no issue as to the foregoing facts. They are admitted by the demurrer. They are recognized by the opinion of the Supreme Court of Washington (R. 38).

V.

QUESTIONS PRESENTED TO THE SUPREME COURT OF WASHINGTON AND ITS DECISION THEREON

On many of the questions presented to the Supreme Court of Washington its decision is not subject to review. Those questions which were presented and which are subject to review by this court and which will be considered in this brief may be stated as follows:

1. Whether appellant is denied equal protection of the law and deprived of its property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that by the city's ordinance No. 62,662 there is imposed upon appellant for revenue purposes only a license tax of three per cent of appellant's gross income from its light and power business in the City of Seattle, and the same or a similar burden is not imposed upon appellant's competitor, namely, the City of Seattle, which is engaged in the same business in a proprietary capacity (not governmental) for profit.

The Supreme Court of Washington answered this question in the negative.

2. Whether under the facts in this case the City of Seattle, may, without contravention of the due process and equal protection clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States classify corporations engaged in the light and power business for profit in the City of Seattle into two groups, namely, (1) municipally owned, and (2) privately owned, and impose a license tax solely for revenue purposes in an amount of three per cent of its gross income upon the privately owned public utility corporation and exempt from tax, or fail to impose such a tax upon the competing municipally owned utility corporation.

The Supreme Court of Washington answered this question in the affirmative.

3. Whether, under the facts of this case, the tax imposed upon appellant by ordinance No. 62,662 constitutes an appropriation of appellant's property without compensation and will deprive appellant of its property without due process of law and will deny appellant equal protection of the law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, even though the city could and did by said

ordinance impose upon itself the same tax which it asserts the right to impose upon appellant.

The Supreme Court of the State of Washington answered this question in the negative.

4. Whether under the facts of this case in its application to appellant, Seattle ordinance No. 62,662 is repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States because in its actual operation and effect the application thereof to appellant will inherently constitute an oppressive and confiscatory exercise by the city of a governmental power of taxation in aid of the city's proprietary business, and will result in a spoliation of appellant's business and property and an appropriation thereof by the city without compensation.

The Supreme Court of Washington answered this question in the negative.

5. Whether under the facts of this case, Seattle Ordinance No. 62,662 constitutes an impairment of the franchise contract between appellant and the city, in contravention of Article I, Section 10, of the Constitution of the United States.

The Supreme Court of the State of Washington answered this question in the negative.

6. Whether Seattle Ordinance No. 62,662 is repugnant to due process clause in Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the ordinance is vague, indefinite and uncertain, particularly as to the definition of "gross income" in Section 2 thereof, with respect to the amount of the tax to be paid and the method by which the amount may be ascertained.

The Supreme Court of Washington answered this question in the negative.

Mr. Justice Steinert of the Supreme Court of Washington filed a dissenting opinion (R. 45).

VI.

SPECIFICATION OF ERRORS

The errors assigned in the record (R. 61) which appellant intends to urge and upon which appellant relies for reversal of the judgment of the Supreme Court of the State of Washington dated June 14, 1933, are:

I.

The Supreme Court of the State of Washington erred in holding that Ordinance No. 62,662 of the City of Seattle, under the facts of this case, does

not deny to appellant the equal protection of the law and does not deprive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States, in that, in and by said ordinance, there is imposed upon appellant, for revenue purposes only, a license tax of three per cent of appellant's gross revenues from its electric light and power business in the City of Seattle, and the same or a similar burden is not imposed upon appellant's competitor in said electric light and power business in said City of Seattle, namely, The City of Seattle, which is engaged in such business in a proprietary capacity (not governmental) and for profit.

II.

The Supreme Court of the State of Washington erred in holding that even though appellee, the City of Seattle, in a proprietary capacity and for profit is engaged in direct and active competition with appellant in the light and power business in the City of Seattle, the City of Seattle may lawfully impose upon appellant a license tax solely for revenue purposes in the amount of three per cent of appellant's gross revenue from its said light and power business, and may fail to impose a similar

tax upon appellant's competitor in said business, the City of Seattle, and may exempt appellant's said competitor from such taxation; and in holding that for the purpose of such a tax imposed by the City of Seattle the said city may classify the corporations engaged in the electric light and power business in the city into two groups, namely, (1) municipally owned, and (2) privately owned, and may impose such an excise tax upon the privately owned corporation engaged in such business and may exempt from such tax or fail to impose the tax upon the municipal corporation which is engaged in the same identical business in a proprietary capacity and for profit. Such holdings of the Supreme Court of the State of Washington deny appellant equal protection of the law and deprive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

III.

The Supreme Court of Washington erred in failing to hold that, under the facts of this case, the tax imposed upon appellant by Seattle Ordinance No. 62,662, constitutes an appropriation of appellant's property without compensation and will de-

prive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States, even though the City of Seattle could and did by said ordinance impose upon itself the same tax which by said ordinance it asserts the right to impose upon appellant.

IV.

The Supreme Court of the State of Washington erred in refusing to hold that in its application to appellant under the conceded facts said ordinance is repugnant to the Fourteenth Amendment to the Constitution of the United States because in its actual operation and effect the application thereof to appellant will constitute an oppressive and confiscatory exercise of a governmental power of taxation by the City of Seattle in aid of its proprietary business, will enable the City of Seattle as witness, prosecutor, jury, judge and executioner (regardless of motive) to eliminate appellant as competitor of the City of Seattle and will result in a spoliation of appellant's business and property and an appropriation thereof by the City of Seattle without compensation.

V.

The Supreme Court of the State of Washington erred in holding that said Ordinance No. 62662 of the City of Seattle does not constitute an impairment of the franchise contract between appellant and the City of Seattle, in contravention of Article I, Section 10, of the Constitution of the United States.

VI.

The Supreme Court of the State of Washington erred in refusing to hold that the ordinance is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States in that the ordinance, and particularly the definition of the "gross income" in Section 2 thereof, is vague, indefinite and uncertain.

VII.

SUMMARY OF ARGUMENT

First: Under the novel facts of this case and the established controlling legal principles, Seattle Ordinance No. 62,622, in its application to appellant, is repugnant to the equal protection clause in Section 1 of the Fourteenth Amendment to the

Constitution of the United States, in that by said ordinance a license tax for revenue purposes only, in the amount of three per cent of appellant's gross income from its light and power business in the City of Seattle, is imposed upon appellant, a privately owned public utility corporation, and the same or a similar tax in fact and in law is not imposed upon appellant's competitor in said light and power business in the City of Seattle, namely, the City of Seattle, a municipal corporation, which is engaged in such business in a proprietary capacity and for profit. Such a classification is essentially arbitrary, capricious, unreasonable, unreal, and discriminatory.

The case of *South Carolina Power Co. vs. South Carolina Tax Commission*, 52 Fed. (2d) 515, relied upon by the Supreme Court of Washington, does not sustain the validity of the ordinance.

Second: Under the novel facts of this case, the imposition upon appellant of the tax prescribed by Seattle Ordinance No. 62,662 inherently will constitute an appropriation of appellant's property without compensation, will deprive appellant of its property without due process of law, and will deny appellant equal protection of the law, in contravention

of Section 1 of the Fourteenth Amendment to the Constitution of the United States, even though the city imposed the same tax upon itself.

The imposition of the tax upon appellant inherently constitutes a denial of equal protection of the law, regardless of payment or nonpayment thereof by the city. Any payment by the city to itself would be only an idle gesture and under the novel facts of this case could and would not be a payment in fact.

The imposition of the tax upon appellant inherently constitutes a denial of due process of law, regardless of payment or nonpayment thereof by the city. The reasons follow:

The city may not directly support and subsidize its proprietary light and power business by imposing a tax upon appellant, its privately owned competitor.

The validity of a taxing ordinance is to be determined by the practical results which follow its operation.

Under the novel facts of this case the practical and actual result which inherently follows the operation of the ordinance in its application to appellant is that the city will annually exact $120,000.00

or more of appellant in aid and subsidy of the city's proprietary light and power business in all respects the same as though said tax were imposed specifically for such purpose. The actual and practical results of the application of the ordinance to appellant will be (1) the elimination of appellant as a competitor of the city and a confiscation of appellant's business by the city; (2) an unlawful and oppressive governmental invasion by the city of the privacy of appellant's business to the direct aid of appellant's competitor and to the destruction of appellant; and (3) an unlawful depreciation of the value of appellant's property and a spoliation thereof, and *pro tanto*, a confiscation and an appropriation thereof without compensation. Under the novel facts of this case, the vices complained of are inherent in any assertion by the city of a power to tax its competitor regardless of the city's actual or asserted motive.

The Supreme Court of Washington is in error in its statement: "The question is: Can the State's power of taxation be abridged or abrogated by estoppel?"

The city may not lawfully be witness, prosecutor, judge, jury and executioner in the elimina-

tion of its competitor and in the appropriation of its competitor's property.

Third: Seattle Ordinance No. 62,662 requires appellant, as a condition precedent to the lawful continuance of its business in the City of Seattle, to secure and pay for a license. This requirement constitutes an impairment of the operative franchise contract between appellant and the city, in contravention of Article I, Section 10, of the Constitution of the United States.

Under penalty of fine and imprisonment, the ordinance prohibits the continuance of appellant's business in the City of Seattle unless appellant secures and pays for a license.

Appellant's franchise is a license from the city to engage in and to continue its light and power business in the City of Seattle until March 14, 1952. By said franchise appellant is charged with the duty of continuously operating said business.

The ordinance impairs the obligation of the franchise contract in that by the ordinance it becomes unlawful for appellant to exercise the privilege granted by the franchise contract unless appellant complies with the added burdens imposed by the ordinance.

Fourth: Seattle Ordinance No. 62,662 is repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States in that the definition of gross income in Section 2 thereof is vague, indefinite and uncertain.

The ordinance definition of gross income is so vague, indefinite and uncertain that the taxpayer must guess at its meaning. The penalty for a wrong guess is a heavy fine and imprisonment.

A taxing ordinance in terms so vague that men of common intelligence must guess at its meaning and differ as to its application violates the first essential of due process.

VIII.

ARGUMENT.

FIRST: IN ITS APPLICATION TO APPELLANT, A PRIVATELY OWNED PUBLIC UTILITY CORPORATION, SEATTLE ORDINANCE NO. 62,662 IS REPUGNANT TO THE EQUAL PROTECTION CLAUSE IN SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT BY SAID ORDINANCE A LICENSE TAX FOR REVENUE PURPOSES

ONLY, IN THE AMOUNT OF THREE PER CENT OF APPELLANT'S GROSS INCOME FROM ITS LIGHT AND POWER BUSINESS IN THE CITY OF SEATTLE IS IMPOSED UPON APPELLANT AND THE SAME OR A SIMILAR TAX IN FACT AND IN LAW IS NOT IMPOSED UPON APPELLANT'S COMPETITOR IN SAID LIGHT AND POWER BUSINESS IN SAID CITY OF SEATTLE, NAMELY, THE CITY OF SEATTLE, A MUNICIPAL CORPORATION WHICH IS ENGAGED IN SUCH BUSINESS IN A PROPRIETARY CAPACTY (NOT GOVERNMENTAL) AND FOR PROFIT.

The Novel Facts of This Case Warrant Detailed Consideration.

In the City of Seattle there are two public utility corporations which are lawfully engaged in the business of selling electrical energy for light and power purposes to the public for hire. One of these corporations, the appellant, is privately owned. The other corporation, the city, is municipally owned.

The city is engaged in such light and power business and owns and operates same in a proprietary (not governmental) capacity.

Abrams vs. City of Seattle, 60 Wash. 356;

Riddoch vs. State, 68 Wash. 329, 334;

Bjork vs. Tacoma, 76 Wash. 225;

Tobin vs. Seattle, 127 Wash. 664;

Aronson vs. Everett, 136 Wash. 312, 316;

Vilas vs. Manila, 220 U. S. 345, 356;

South Carolina vs. United States, 199 U. S. 437, 462.

The city is engaged in such business for profit. Its capital investment in light and power generating and distribution facilities has been financed by the issuance and sale to the public of revenue bonds. The principal and interest of such revenue bonds are by the laws of the State of Washington (Remington's Revised Statutes of Washington, 9491) under which same were issued and by the expressed terms of each of said bonds payable only out of the gross revenues of its light and power business. In the language of the Washington Supreme Court in its decision in this case (R. 41) such bonds "are a prior lien on the entire income from it (the city's light and power business)—taking precedence even over operating charges." The principal amount of such revenue bonds now outstanding is in excess of thirty million dollars.

The competition between appellant and the city is direct. Persons living in the City of Seattle may purchase electrical energy for light and power purposes only from appellant or the city. Each of the competitors is continuously seeking new customers. Each competitor of necessity is alert to retain its customers against the aggressive efforts of the other to secure same.

The same rates have been and now are charged by the competing corporations. If appellant were to charge a rate higher than that charged by the city, appellant would lose all of its customers.

Appellant's rates are subject to the exclusive regulation of the Department of Public Works of the State of Washington. The city's rates are determined exclusively by its City Council, which is the legislative parent of its Ordinance No. 62,662. The city's rates are not subject to regulation of any kind or character by the State of Washington.

Appellant is required to pay and does pay city, county and state property taxes upon the property owned by it, including its franchise granted by appellee. The city is exempt from such taxes.

The city subsidizes its light and power business by paying itself out of tax supported funds an

amount in excess of $438,000 annually for the electrical energy used for light and power by itself for governmental and other purposes. The city furnishes such energy to itself in quantity and at rates determined solely by its City Council.

Other than that the city is a preferred competitor to the extent indicated by the foregoing facts, the only difference between appellant and the city with respect to the light and power business in which each is engaged is one of ownership. Appellant is privately owned. Appellant's competitor is municipally owned. There is no other difference.

By the city's Ordinance No. 62,662 appellant is subjected to an annual license tax in the amount of three per cent of its gross income from its light and power business. The tax is imposed solely for revenue purposes. The burden of the ordinance tax is not imposed upon the city. Nor is the ordinance enforcible against it. The following quotation from the majority opinion of the Washington Supreme Court clearly and accurately states the facts:

> "The city, in its proprietary capacity, is in competition with appellant in the power and light business. The possible consequence to appellant, if it is subjected to an excise of three per cent on its gross revenues, while its competitor escapes the burden, are too obvious for

discussion. Evidently having such consequences in mind, the city council, by virtue of § 6 of the ordinance, has undertaken to subject the city's power and light business to the tax imposed upon persons and corporations engaging in that business. This is merely a more or less friendly gesture. The city has not allocated, and probably cannot allocate, any of the revenues of its power and light business to the payment of such a tax. Bonds have been issued in excess of $30,000,000 against the revenues from that business; and those bonds are a prior lien on the entire income from it—taking precedence even over operating charges. Conceding that the city's light and power revenues could be subjected to the tax, no machinery is set up in the ordinance to accomplish such an end. Furthermore, in making up its budget for 1932, no provision was made for the levy of general taxes to cover the excise provided for in the ordinance. So the problem must be met as though § 6 had been omitted from the ordinance; as though the city had levied the excise on the appellant and exempted its own light and power business therefrom.

Conceding, for the sake of argument, that to be the situation, counsel for the city seek to sustain the tax against appellant under the doctrine that constitutional limitations on the taxing power do not prevent a reasonable classification of persons and occupations subject to the tax; and that a privately owned light and power business is subject to a different classification than one owned by a municipality—that the one may properly be subjected to the excise and the other exempted." (R. 40.)

The Washington Supreme Court held that under the foregoing facts the city, a municipal cor-

poration (not a sovereign state), for revenue excise tax purposes, may lawfully classify the corporations which are engaged in the light and power business in the City of Seattle into two classes, namely, (1) privately owned corporations, and (2) municipal corporations, and that the city's imposition of the tax prescribed by its Ordinance No. 62,662 only upon the privately owned corporation does not deny it equal protection of the law and that such a classification is not discriminatory, arbitrary, unreasonable or unreal.

Appellant submits that in reaching such result the Supreme Court of Washington erred. The error is not in its failure to recognize established legal principles. It is in the failure to recognize the full significance of the foregoing novel but admitted facts and in the failure to apply to these facts the controlling legal principles.

The Controlling Legal Principles Are Not Novel

For the purpose of excise taxation the legislative body may lawfully classify persons with respect to their business or occupation in so far as there is some reasonable basis for the classification

and provided all in each class are taxed or exempted alike.

Flint vs. Stone Tracy Co., 220 U. S. 107;

Bradley vs. Richmond, 227 U. S. 477;

Truax vs. Corrigan, 257 U. S. 312;

State Board of Tax Commissioners vs. Jackson, 283 U. S. 527.

The classification made, however, may not be arbitrary, capricious, unreasonable, unreal or irrational. Discrimination between persons engaged in the same occupation, when the distinction between those who are taxed and those who are not taxed is based upon an "unnatural fact," or merely constitutes an attempt to favor one class at the expense of another, will not be tolerated. The test is, does it operate upon all those similarly affected and is there just and reasonable basis for making the distinction. The rule is generally stated to be that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Ohio Oil Co. vs. Conway, 281 U. S. 146;

Quaker City Cab Co. vs. Pennsylvania, 277 U. S. 389, 402;

Louisville Gas & E. Co. vs. Coleman, 277 U. S. 32, 37;

Power Mfg. Co. vs. Saunders, 274 U. S. 490, 493;

Frost vs. Corporation Commissioner, 278 U. S. 515, 522;

Ohio River & W. R. Co. vs. Ditty, 232 U. S. 576, 590;

Airway Corp. vs. Day, 266 U. S. 69;

Heisler vs. Thomas Colliery Co., 260 U. S. 245;

Royster Guano Co. vs. Virginia, 253 U. S. 412;

Atchison, etc. R. R. Co. vs. Matthews, 174 U. S. 96;

Barbier vs. Connolly, 113 U. S. 27;

Strauder vs. West Virginia, 100 U. S. 303.

In *Quaker City Cab Co. vs. Pennsylvania*, 277 U. S. 390, 402, the rule which in application to the facts of the instant case most clearly indicates the error of which appellant complains is enunciated in the following language:

> "In effect Section 23 divides those operating taxicabs into two classes. The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. *The character of the owner is the sole fact on which the distinction and discrimination are made to depend.* The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of

the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. *Power Mfg. Co. vs. Saunders, supra.* No decision of this court gives support to such a classification. In no view can it be held to have more than an arbitrary basis. As construed and applied by the state court in this case, the section violates the equal protection clause of the 14th Amendment . . . " (Italics ours.)

IN ITS APPLICATION TO APPELLANT THE ORDINANCE CONTRAVENES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

If in the City of Seattle two privately owned companies, one named A and one named B, were engaged in the light and power business, and the City of Seattle undertook to impose an excise tax the same as the tax here involved upon Company A and exempted or failed to impose the same excise tax upon Company B, would any court, state or federal, for an instant hesitate to hold that such classification would be unreasonable, unreal, arbitrary and capricious, and that thereby Company A was denied that equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

In what respect is there any difference between appellant, a privately owned power company, and respondent, City of Seattle, as to the business engaged in by each respectively? It is the same business. The parties are in direct and active competition with each other. Both are in the business for profit. The city is exercising no governmental function and is serving no governmental purpose in engaging in such business in competition with its citizens. Nor is the city seeking to exercise any police power by the imposition of the tax. It is true that the city is not subject to regulation by the State of Washington. It is true that the city is not required to pay any property taxes under the laws of the State of Washington. It is true that the city, by its rates which it alone has power to determine, definitely controls its competitor's earnings. It is true that the city by reason of the fact that it is a city has many advantages over its competitor. But again we ask in what respect is there any difference between appellant and the city as to such business which can possibly warrant a decision that it is "reasonable" for the city to impose the excise tax upon appellant but not upon appellant's competitor, the city itself?

Application of the foregoing principles to the novel facts of this case brands the classification made by the city in its Ordinance No. 62,662 and approved by the Washington Supreme Court, as one which is essentially and palpably discriminatory, arbitrary and unreasonable. The character of the owner "is the sole fact on which the distinction and discrimination are made to depend." There is no other difference. In its application to appellant the ordinance violates the equal protection clause of the Fourteenth Amendment.

The Case of South Carolina Power Company vs. South Carolina Tax Commission, 52 Fed. (2d) 515, Relied Upon by the Supreme Court of the State of Washington, Does Not Sustain the Validity of the Ordinance.

In the majority opinion of the Washington Supreme Court the case of *South Carolina Power Co. vs. South Carolina Tax Commission*, 52 Fed. (2d) 515, is cited as a sustaining authority. The case is not in point for the following reasons:

The tax in that case was imposed by the sovereign state of South Carolina which was not engaged in a proprietary business as a competitor of any privately owned corporation or individual in

any territory, county or city in the state. In the instant case the tax is imposed by a municipality which in a proprietary capacity for profit is in direct and active competition with appellant.

In the State of South Carolina there was no competition any place between a municipality manufacturing or generating electricity and a privately owned company or individual engaged in the same business in the same territory.

On the point for which it is cited by the Washington Supreme Court the decision actually turned upon the following facts (52 Fed. (2d) 515, 520):

> "So far as the exemption accorded municipalities is concerned, a municipality is an agency of the state, and its operations are conducted not for private profit but for the benefit of the public or its citizens. *Irvine vs. Town of Greenwood*, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363. Its property and business conducted by it are ordinarily not taxed at all; and legislation of the state taxing or exempting same from taxation is not open to the objection that it offends the equal protection clause of the 14th Amendment. See *Village of Hardwick vs. Wolcott*, 98 Vt. 343, 129 Atl. 159, 39 A. L. R. 1222 and note."

It is at that point that the case ceases to be of any assistance to the city or of any weight in the instant litigation. The reason is that contrary

to the weight of authority and contrary to the law of the State of Washington, the law of the State of South Carolina is that a municipality engaged in the business of manufacturing and generating electricity for the use of its customers is exercising a *governmental* not a proprietary function.

In South Carolina a municipal corporation is not liable for injuries caused by the negligent operation of its electric light plant because:

> " * * * municipal corporations are created solely for public and governmental purposes and that all powers granted to them by the General Assembly under the sanction of the Constitution are to be exercised as public and governmental functions for the benefit of the municipal community."
>
> *Irvine vs. Town of Greenwood*, 89 So. Carolina 511, 72 S. E. 228, 230.

The Supreme Court of South Carolina recognizes this rule to be contrary to that adopted in other states. In the case of *Triplett vs. City of Columbia*, 111 So. Carolina 7, 96 S. E. 675, 1 A. L. R. 349, the court said:

> "In the second place, the courts of most other states recognize a distinction between what are called governmental, and corporate or ministerial, functions in such corporations, while this court has expressly rejected that distinction, and held that all the powers conferred

upon such corporations are to be exercised as governmental powers."

See also:

Mullinax vs. Hambright, 115 South Carolina 22, 104 S. E. 309.

The *annotator* in 43 L. R. A. (N. S.) 863, in referring to the South Carolina rule, states:

"But this holding is contrary to the great weight of authority on the subject as well as to sound reasoning, and in view of the tendency of the times would, if generally adopted, work great injustice to private rights."

The question as to the constitutional validity of the exemption accorded municipal plants under the South Carolina statute was not submitted to or passed upon by this court:

South Carolina Power Co. vs. South Carolina, 286 U. S. 525, 60 Fed. (2d) 528;

Broad River Power Co. vs. Query, 288 U. S. 178.

SECOND: UNDER THE FACTS OF THIS CASE THE IMPOSITION UPON APPELLANT OF THE TAX PRESCRIBED BY SEATTLE ORDINANCE NO. 62,662, INHERENTLY WILL CONSTITUTE AN APPROPRIATION OF APPELLANT'S PROPERTY WITHOUT

COMPENSATION, WILL DEPRIVE APPELLANT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, AND WILL DENY APPELLANT EQUAL PROTECTION OF THE LAW, IN CONTRAVENTION OF SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES EVEN THOUGH THE CITY IMPOSED THE SAME TAX UPON ITSELF.

In construing the city's Ordinance No. 62,662 the Washington Supreme Court has definitely held that the ordinance does not impose the tax upon the city.* In clear and concise language the court states:

> "So the problem must be met as though Section 6 had been omitted from the ordinance; as though the city had levied the excise on the appellant and exempted its own light and power business therefrom."

This construction of the ordinance by the State Supreme Court as to the meaning and application thereof will be followed by this court.

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*The facts alleged in the complaint and admitted by the demurrer and the authorities upon which the Supreme Court of Washington based its interpretation of the ordinance are printed in the Appendix. While such facts and authorities are in no respect pertinent to the issues involved in this appeal, it seems in order to make same available for such examination, if any, as may be desired.

Clement National Bank vs. Vermont, 231 U. S. 120, 134;

Dorchy vs. Kansas, 264 U. S. 287, 288;

Edwards Hines Yellow Pine Trustees vs. Martin, 268 U. S. 459, 462, 463, 464;

Frost vs. Railroad Commission, 271 U. S. 583, 592, 593;

Keith vs. Johnson, 271 U. S. 1, 8;

Sioux County vs. National Surety Company, 276 U. S. 238, 240;

Chicago M. St. P. & P. R. Co. vs. Risty, 276 U. S. 567, 570;

Hawks vs. Hamill, 288 U. S. 52.

We quote the language of Mr. Justice Cardozo in *Hawks vs. Hamill*, 288 U. S. 52:

> "Out of two or more meanings that were possible and plausible the State of Oklahoma has picked the one comporting best in the thought of her official spokesman with the 'genius' of her history. The mists of our own uncertainties are scattered when pierced by this authentic evidence of the law of the locality . . ."

We also quote the language of Mr. Justice Butler in *Keith vs. Johnson*, 271 U. S. 1, 8:

> "This court will follow the decisions of the state courts as to the meaning and proper application of the state transfer tax law, any expressions in its earlier decisions to the contrary notwithstanding."

We quote also the language of Mr. Chief Justice Hughes in *Clement National Bank vs. Vermont*, 231 U. S. 120, 134:

> ". . . There is no difficulty in the interpretation of the statute as to the prescribed incidence of the tax, and aside from that, the decision of the state court is controlling as to the persons upon whom the statute fixed responsibility. It was the province of that court to determine what the terms of the statute authorized, commanded or forbade and it is for this court to say whether, in view of its operation, thus delimited, it conflicts with Federal law. . . ."

UNDER THE FACTS IN THIS CASE THE IMPOSITION OF THE TAX UPON APPELLANT INHERENTLY CONSTITUTES A DENIAL OF EQUAL PROTECTION OF THE LAW, REGARDLESS OF PAYMENT OR NONPAYMENT THEREOF BY THE CITY.

If, contrary to law and to the facts, it be assumed that the city could and by its ordinance did actually impose upon itself an annual excise tax of three per cent of the gross income from its light and power business, and if it be further assumed, contrary to the facts, that the city thereupon actually performed the mechanics of paying itself the tax, even then such an ordinance in

its application to appellant would constitute a denial of equal protection of the law. Such a payment by the city would not be a payment in fact. It would constitute nothing more than an idle gesture.

In the first place, the whole theory of a city taxing itself seems to constitute nothing more than a mental mirage. There is no reality or substance to support the theory. The act of a city in taxing itself seems futile and meaningless to the same extent as would be the act of a man tipping himself.

In the second place, under the facts of this case there would and could be no actual payment by the city. To pay the tax (if the ordinance really required payment by the city) the city would transfer the amount thereof from its proprietary light and power pocket to its tax supported general fund pocket. From its tax supported general fund pocket, however, the city, by direction of its city council (which has sole and exclusive authority to do so) annually appropriates a sum in excess of $438,000 for the benefit of its proprietary light and power business. The consideration for such payment is the light and power used by the city in the performance of its various functions. The amount

of such annual payment is not determined by the market value of the light and power which the city sells itself. There is no competition for such business. The city, by its City Council, arbitrarily fixes the rate which it charges itself for such electrical energy and the quantity which it will sell to itself. That rate and quantity may be increased at the will of the city. An increase in the rate or quantity will produce the money necessary to enable the city to pay the self-imposed excise tax. All that is needed for such purpose is a resolution of the City Council. By reason solely of a mere journal entry and or a resolution of the City Council, the city would hope to avoid the constitutional prohibition against the denial of equal protection of the law, without actually paying one penny of the tax which the city ostensibly would have imposed upon itself.

The purported payment of the tax by the city would be only a paper transaction. The book entry crediting the city's general fund with receipt of the tax paid by the city would be offset by another book entry debiting a similar amount against the city's general fund in favor of the city light fund, in ostensible payment of the light and power which the city sells itself. If the ordinance imposed a

tax of $100,000 a year upon the city, in payment thereof (on paper only) $100,000 would go into its general fund pocket, but without even a stoppage in transit said money would return to its point of origin, namely, the city's light and power pocket. Under such facts there is and can be no reality in any payment of the tax by the city.

If by reason of such meaningless mechanics the city is thereby enabled to lawfully extract $120,000 a year from the gross income of its competitor, then equal protection of the law, by the Fourteenth Amendment guaranteed, ceases to exist in fact. To label the gesture as friendly does not cure the inherent evil. To seek a pure motive for the gesture, or to presume good faith on the part of the city cannot change the actual operation and effect of the conduct. These are fixed and determined by the facts. In any imposition of such a tax upon appellant by its competitor under the facts as they are in this case, there is inherently a denial to appellant of equal protection of the law. Imposition of a similar tax by the city upon itself and payment thereof cannot cure such inherent invalidity.

UNDER THE FACTS IN THIS CASE THE IMPOSITION OF THE TAX UPON APPELLANT INHERENTLY CONSTITUTES A DENIAL OF DUE PROCESS OF LAW, REGARDLESS OF PAYMENT OR NONPAYMENT THEREOF BY THE CITY.

The City of Seattle May Not Directly Support and Subsidize Its Proprietary Light and Power Business by Imposing a License Tax Upon Appellant, Its Privately Owned Competitor in Such Business.

If the city were to enact an ordinance which by its expressed terms imposed the license tax upon appellant for the purpose of aiding and subsidizing appellee's proprietary light and power business, such ordinance would be constitutionally invalid for the following reasons:

By such an ordinance appellant would be denied due process of law. By it appellant would be denied equal protection of law. By it appellant would be deprived of its property without compensation. By it, through the exercise of a governmental power of taxation, the city, to the direct aid of its private and proprietary business, would be drawing "sustenance or power to itself through

an assumption of public and governmental functions to the strangulation" of appellant with whom it voluntarily competes. Such an attempt would shock the conscience of any court of equity. Such an ordinance would promptly be declared unconstitutional by reason of the legal principles discussed in the case to be noted, and by reason of the ordinary principles of justice, equity, fair play and honest conduct.

There is no case of record in which any municipality has been bold enough to attempt to impose such a tax upon its competitor for any purpose. *A fortiori* there is no case of record in which any municipality has been bold enough to impose such a tax upon its competitor in aid and subsidy of the proprietary competing utility business owned by the municipality. Hence, it is not strange that the cases of record in which a similar issue has been before the courts are few. If there were no decided cases available as authorities for the legal principles upon which appellant is relying, the novel facts here presented warrant the birth of some new principles. The case of *Los Angeles Gas & Elec. Co. vs. City of Los Angeles*, 241 Fed. 912 (affirmed 251 U. S. 32) is in point, however.

See also:

South Carolina vs. United States, 199 U. S. 437.

In *Los Angeles Gas & Elec. Co. vs. City of Los Angeles*, 241 Fed. 912 (affirmed 251 U. S. 32), the City of Los Angeles in a proprietary capacity was in competition with the privately owned gas and electric company. By ordinance the city "for the immediate preservation of the public peace, health and safety" (the exercise of a governmental power) attempted to require the privately owned utility, at its own expense, to relocate its wires and instrumentalities upon the streets of the City of Los Angeles when necessary to make room for similar instrumentalities to be placed in such streets, for use by the city in the operation of its proprietary business. In the District Court the ordinance was declared invalid for the following reasons (241 Fed. 912, 918):

> "Whatever the city may do under the guise of the police power it must be remembered it does in its governmental capacity. The exercise of the police power has been most aptly and perhaps most comprehensively defined as 'the power to govern' (*License Cases*, 5 How. 504, 582, 12 L. Ed. 256), the 'most illimitable' of all powers of government (*the Slaughterhouse Cases*, 16 Wall. 36, 62, 21 L. Ed. 394), the 'law of overruling necessity' (28 *Cyc.* 692). Whatever the city does, however, in the matter of

actually engaging in the furnishing and delivering of electrical energy to itself and its inhabitants is done in its proprietary or quasi private capacity (citing cases) and the two must always be differentiated in any attempt to define and determine the rights of the city in such a controversy as the present.

"While operating in its private capacity, and considerations of necessity giving rise to an exertion of the police power being nonexistent, as adverted to hereinabove, the power of police is wanting, and may not be asserted in furtherance of that which is merely expedient. In other words, when acting clearly within the domain of its private and proprietary capacity, the city may not draw sustenance or power to itself through an assumption of public and governmental functions. As said by the Supreme Court of the United States in *South Carolina vs. United States*, 199 U. S. 437, ... quoting from a Pennsylvania case where the question of the city supplying gas to its inhabitants was under consideration:

. . "'Such contracts are not made by the municipal corporation, by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to

it. *Blending the two powers in one grant does not destroy the clear and well-settled distinction*, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons, upon whom the like special franchises had been conferred.' (Italics supplied.)

. . . . . .

"As indicated hereinabove, assuming the necessity, propriety, and expediency of such course to have been satisfactorily determined by those in authority, I am in entire harmony with a plan of municipal improvement such as has been projected in the city of Los Angeles and as is here under consideration. *I am, however, also firmly of the belief that until the city, by purchase, appeal to eminent domain, or otherwise, has lawfully and properly and justly eliminated competition, it must meet its competitors as any other private agency would be compelled to meet them, and must stand, with them in the same relation to the law, and let its success be measured by its ability satisfactorily to serve the public, rather than by its power through the exertion of public functions to occupy a position of supremacy in the field which it deliberately has chosen to invade.*" (Italics supplied.)

Upon appeal to this court the decision of the District Court was affirmed in opinion written by *Mr. Justice McKenna*, (251 U. S. 32).

Under the foregoing authority, if authority be needed, and, under the fundamental principles of justice, equity, fair play, liberty and honest conduct, it is apparent that the city may not lawfully support and subsidize its proprietary light and power business by imposing a license tax upon appellant, its privately owned competitor in such business.

UNDER THE NOVEL FACTS OF THIS CASE THE PRACTICAL AND ACTUAL RESULT WHICH FOLLOWS THE OPERATION OF SEATTLE ORDINANCE NO. 62,662 IN ITS APPLICATION TO APPELLANT IS THAT THE CITY WILL ANNUALLY EXACT $120,000 OR MORE OF APPELLANT IN AID AND SUBSIDY OF THE CITY'S PROPRIETARY LIGHT AND POWER BUSINESS IN ALL RESPECTS THE SAME AS THOUGH SAID TAX WERE IMPOSED SPECIFICALLY FOR SUCH PURPOSE.

The Validity Of A Taxing Ordinance Is To Be Determined By The Practical Results Which Follow Its Operation

It is definitely established that the validity of a tax is to be determined by its true operation and

effect on the basis of the practical results which follow its operation.

Educational Film Corp. vs. Ward, 282 U. S. 379;

McCallen vs. Massachusetts, 279 U. S. 620;

Louisville Gas & Elec. Co. vs. Coleman, 277 U. S. 32;

St. Louis Cotton Compress Co. vs. Arkansas, 260 U. S. 346;

Postal Tel. & Cable Co. vs. Taylor, 192 U. S. 64;

Mugler vs. Kansas, 123 U. S. 623;

Craig vs. Missouri, 4 Peters (U. S.) 410;

Aberdeen Savings & Loan Ass'n. vs. Chase, 157 Wash. 351, 364.

The Novelty Of The Facts In The Case At Bar Compels Careful Consideration Thereof

The true and actual operation and effect of the instant ordinance in its application to appellant can only be determined after careful consideration of the novel facts of this case. There is of record no other case in which a taxing authority has ever attempted to assert its taxing power under a similar state of facts.

Appellant and the city are engaged in the same business. They are in direct and active competition

with each other. Both are engaged in the same business for profit. The city is exercising no governmental function and is serving no governmental purpose in the operation of such business in competition with private citizens. Both appellant and the city are engaged in the same business, for the same purpose and in like capacities.

Appellant may not complain of the normal competition with the city, because appellant's franchise is not exclusive. In such normal competition between the two utility corporations, however, there is an inherent inequality. The city by reason of the fact that it is a municipal corporation has substantial advantages over its privately owned competitor. Appellant is required to pay and does pay state, county and city property taxes. The city is wholly exempt from such taxes. The justification (if any) for this discrimination, patently present in the normal competition between a privately owned and a municipally owned utility, is that ownership of property by the privately owned utility may itself warrant a tax levied for the support of the *general government*. There is no such justification, however, for a discriminatory license tax on the competitive proprietary business measured by the gross revenue thereof. Such a tax is

a direct appropriation, *pro tanto*, of such revenues by the taxpayer's competitor.

Appellant's rates, rules, accounting practices and earnings are rigidly regulated by the State of Washington. The city is exempt from such regulation. (Remington's Revised Statutes 10339 et seq.; 10454.) Appellee's city council has sole and exclusive authority to do as it pleases with respect to the management and operation of its light and power business. In addition to the foregoing, there are advantages to the city, more or less general but nevertheless real, which are incident to the fact that ostensibly it belongs to the people.

The city by its Ordinance No. 62,662 now asserts the right to intensify the inherent inequality and unfairness of this normal competition by drawing sustenance from its competitor through the exercise by the city of a governmental power of excise taxation imposed for revenue purposes only. At this time it seeks three per cent of appellant's annual gross income, which tax for the first year will amount to approximately $120,000. Once the power to impose such a tax upon appellant in any amount is decreed, there will be *per se* no legal or equitable barrier to the imposition of a larger tax. The city can always establish that it needs more

money. The amount of the tax, if there is decreed the power to impose any tax, will be within the legislative discretion of appellee's city council.

The Practical and Actual Result of the Application of the Ordinance to Appellant Will Be the Elimination of Appellant as a Competitor of the City and a Confiscation of Appellant's Business by the City.

This new weapon of competition which the city now asserts the right to use against appellant is inherently destructive of the competition. However large or small may be the amount of the tribute exacted, the actual and practical results which will follow the application of the ordinance to appellant will be the ultimate elimination of appellant from the light and power business in the City of Seattle and the spoliation and confiscation of appellant's business and property by appellee. The reasons follow.

Prior to the imposition of the ordinance tax appellant's rates were reasonable, and its income was and may be no more than adequate to enable it to earn a reasonable return (if any) upon its investment in the business. The State of Washington which has sole and exclusive power to reg-

ulate appellant's rates and income has approved both. The city may not contend to the contrary because it charges the same rates which are charged by appellant.

By its new weapon of competition the city would appropriate three per cent of appellant's gross income, which amount may be one hundred or two hundred per cent of appellant's net income from its business in the City of Seattle. Whatever the amount of the exaction may be, it is in fact an appropriation of appellant's net income, if any, or of its capital, if appellant has no net income after payment of the demanded percentage of its gross income to the city.

However confiscatory the amount of the exaction may be, appellant is without remedy in a court of law or equity, or elsewhere. If in a court of law or equity appellant complained that the amount of the tax is confiscatory, its complaint would be promptly and completely answered by a direction to seek relief from the Department of Public Works of the State of Washington. In that state regulatory body is vested sole power under the laws of the State of Washington to regulate, fix and determine the rates which appellant may charge and the reasonableness of appellant's gross and net income.

There will be no relief for appellant in an application to the Washington Department of Public Works for permission to increase its rates. It is true that upon a presentation of the facts herein stated the state regulatory body could authorize appellant to increase its rates. In the event it failed to do so, appellant could seek protection of the courts by appealing from an adverse finding of the Department. In either event, however, should appellant attempt to increase its rates as authorized by the state or the court, appellant would lose all of its customers. The reason is not obscure. A differential in rates in favor of the city would as effectively eliminate appellant as a competitor as would an outright confiscation of appellant's property by the city.

The resulting differential in rates may not be cured by an attempt to require the city to raise its rates to a level which would enable appellant (charging the same rates) to continue in business in the city and to also pay the three per cent gross income tax demanded by appellee. There is no court or regulatory body which can compel the city to raise its rates. That power is vested solely in appellant's city council. (Remington's Revised Statutes, 9488, 10454.)

There is no uncertainty as to the actual consequences which inherently follow from these facts. Under the unequal and unfair *normal* competition and by reason thereof, appellant's gross income from its business in the City of Seattle may be no larger than is permitted by the city. If the city may exercise the power (now asserted) to appropriate a percentage of appellant's gross income, then appellant will be crushed between the unequal and unfair normal competition and the asserted governmental power of its competitor to appropriate its gross income. Under the facts this will constitute an appropriation of appellant's net income (if any). As appellant's financial stability is weakened and ultimately wholly wrecked by the excise tax exactions required of it by its competitor, the value and earnings of the city's proprietary business will be proportionately enhanced. All of appellant's customers will ultimately become customers of the city. The practical and actual result will be that the city from year to year will appropriate appellant's property and business without payment of compensation for the property and business appropriated. Such partial appropriation from year to year will become total and complete when appellant's financial stability is undermined by the constant and cumulative

flow of its limited gross income to its competitor to an extent that appellant may no longer function as a going concern. To decree such a power to the city is to decree to the city power to annihilate appellant to the direct aid and benefit of the proprietary business of the city.

The injustice inherent in the exercise of such a power by the city is not obscure. For more than thirty years appellant has been rendering a public service to the inhabitants of the City of Seattle. Long prior to the time when the city embarked upon its proprietary venture in said business in direct competition with appellant, such public service was available only through appellant. The capital invested in appellant's business is the legitimate investment of the savings of thousands of individual stockholders. Through the years such investments have been jeopardized by the unfair and unequal privileges granted to appellant's municipally owned competitor. In spite of such inequality and such unfairness, however, appellant has continued to exist as a going concern and has continued to render a real public service. Unless appellant is to be now utterly destroyed by a governmental confiscation of its business and property, it will continue to be a going concern and to render such service. It cannot

so continue if its competitor by the exercise of a governmental excise taxing power may appropriate any portion of appellant's gross or net revenues received for such public service. Against the exercise of such a power appellant is utterly helpless. As direct results of the exercise of such a power by its competitor, the days of appellant's continued existence become numbered, its complete elimination from the light and power business in the City of Seattle becomes inevitable, and the legitimate investments of appellant's 15,000 stockholders become valueless. All of which operates directly to enhance the value of the city's proprietary light and power business.

The foregoing practical and actual results of the application of the ordinance tax to appellant do not follow by reason of the legitimate though unfair and unequal normal competition between appellant and the city. They inherently follow the exercise of a governmental power of excise taxation by the city against its competitor. Under such circumstances appellant may not hope to survive.

By reason of these facts it is asserted that the practical and actual operation and effect of the ordinance in its application to appellant will be that

the city will thereby ultimately eliminate appellant as a competitor and will acquire appellant's business without compensation, all in direct aid and to the direct benefit of the city's proprietary business. In addition thereto, from July 1, 1932, until the elimination is complete, the city will receive annually from appellant a sum in excess of $120,000 for the self-created opportunity of annihilating its competitor. This, appellant submits, constitutes a denial of due process of law.

The Practical and Actual Result of the Application of the Ordinance to Appellant Will Be An Unlawful and Oppressive Governmental Invasion by the City of the Privacy of Appellant's Business to the Direct Aid of Appellant's Competitor and to the Destruction of Appellant.

Sections 15 and 16 of the ordinance provide as follows:

"Section 15. *Taxpayer to Keep Books and Records—Returns Confidential:* It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

"The applications, statements or returns made to the City Comptroller, pursuant to this ordinance, shall not be made public, nor shall they be subject to the inspection of any person except the Mayor, the Corporation Counsel, the City Comptroller, or his authorized agent, and members of the City Council."

"Section 16. *Comptroller to Investigate Returns:* If any taxpayer fails to apply for license or make his return, or if the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements, as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place for an investigation of the correctness of the return and may issue a subpoena to the taxpayer, or any other person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpoena, require him, or any person, to bring with him such books, records and papers as may be necessary."

The city by said sections of the ordinance asserts the right to inspect the books and records of its competitor. Knowledge of the names and addresses of appellant's customers, the length and terms of the contracts with each, and the income

received from each will be acquired by appellant's competitor. Survival of the competition under such handicaps will be an impossibility. Nor is this oppressiveness of the ordinance and its inherent invalidity diminished by a presumption, promise or hope that the officers and councilmen of the City of Seattle would not unlawfully use the information obtained. As stated in *Roller vs. Holly*, 176 U. S. 398, 409:

> "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

Mr. Justice Holmes in *Louisville & N. R. Co. vs. Central Stockyards Co.*, 212 U. S. 132, 144, clearly stated the principle:

> "The law itself must save the party's rights and not leave them to the discretion of the courts as such."

A fortiori, the party's rights must not be left to the discretion of a competitor.

The assertion by the city of the extraordinary right to examine the books and records of its competitor, in its actual and true operation and effect, can result only in an unlawful governmental invasion of the privacy of appellant's business and in a governmental confiscation of appellant's prop-

erty, to the material advantage of appellant's competitor. This, appellant submits, constitutes a denial of due process of law.

The Practical and Actual Result of the Application of the Ordinance to Appellant Will Be An Unlawful Depreciation of the Value of Appellant's Property and a Spoliation Thereof and Pro Tanto a Confiscation and Appropriation Thereof by the City Without Compensation.

Under the laws of the State of Washington the city may lawfully appropriate appellant's property by an exercise of the power of eminent domain. As a condition precedent to such an appropriation the city is required to pay appellant the fair market value of its property. That value to a large extent is dependent upon the net earnings of the property. For every dollar taken by the city from appellant's annual gross income (the amount of which is limited by the city's competition) the value of appellant's property is diminished. The greater the amount taken by the city the more the value of appellant's property will be affected. When the maximum has been taken the earning power of appellant's property will be at a minimum. The city, by exercise of its power of eminent domain,

may then acquire the property when the value has been artificially diminished by the city's exercise of governmental taxing power. In the meantime the city will have exacted in excess of $120,000 annually from appellant as an excise tax, which money may be used to pay the amount awarded appellant in such condemnation proceedings.

If, however, the city is not in too great a hurry to wholly remove appellant as its competitor, it may never be necessary for it to attempt to acquire appellant's business and property by an exercise of its power of eminent domain. Under the facts of this case the constant and cumulative appropriation of appellant's gross income from year to year (which by reason of the unfair competition, is in fact an appropriation of appellant's net income, if any), is certain to shorten the life expectancy of appellant as a competitor of the city. Granted the power to impose a tax measured by appellant's gross income, five per cent, or ten per cent thereof, or more, may be taken by the city as lawfully as three per cent. When appellant may no longer remain a going concern by reason of such exactions, the city, without cost to itself, will inherit all of appellant's business.

In application to appellant any exercise of the power asserted by the city will constitute *pro tanto* an appropriation and a confiscation of appellant's business and property from year to year. This, appellant submits, constitutes a denial of due process.

The Vices Complained of Are Inherent in Any Assertion by the City of a Power to Tax Its Competitor, Regardless of the City's Actual or Asserted Motive.

Asserted good faith on the part of the city in the enactment of the ordinance cannot change the foregoing practical and actual results which inherently follow the application thereof to appellant. The assertion by the city that it is not the purpose of the ordinance to strangle and annihilate appellant does not in any respect compensate appellant for the loss of its property and business. Nor does such an assertion diminish the pain, anguish and finality of appellant's electrocution by its competitor. Nor does it make lawful that which in its operation and effect is inherently unlawful. The vices complained of are inherent in any assertion by the city of a power to impose such a tax upon its competitor under the facts herein conceded.

THE SUPREME COURT OF WASHINGTON IS IN ERROR IN ITS STATEMENT: "THE QUESTION IS: CAN THE STATE'S POWER OF TAXATION BE ABRIDGED OR ABROGATED BY ESTOPPEL?"

It is respectfully submitted that a majority of the Supreme Court of the State of Washington erroneously failed to apply the controlling legal principles to the facts of this case. In the opinion of the majority it is stated:

> "The question is: Can the state's power of taxation be abridged or abrogated by estoppel? In the abstract, the question would seem to merit scant consideration; but the allegations of the amended complaint reveal a condition of unfair competition created by the exaction of this tax from the appellant, which commands the careful attention of a court of equity."

The real question presented involves a problem larger than is within the scope of the foregoing restricted statement of the issue. It is not the sovereign, the state, which is imposing the ordinance tax. There is involved much more than is indicated by the use of the word "estoppel." Such word does not adequately reflect the legal principle which is here controlling. That principle is akin to estoppel perhaps, but it is more than that. Nor do the words "abridged or abrogated" seem o be

appropriate or adequate. There is involved more than an abridgement or an abrogation.

The city departed from its governmental domain when it entered the field of private business in competition with its citizens. By its own act, to that extent the city ceased to function as a governmental agency and placed itself upon the level of its citizens. Such act of the city changed its status to the extent that in the competitive field of private business it was no greater than its competitors. That act of the city did not abrogate or abridge any of its governmental powers which could thereafter be lawfully exercised. That act did, however, give birth to a new status, one of the attributes of which was, that in the field of private business in which the city had voluntarily embarked it became subject to the same constitutional rights, prohibitions and restrictions to which its citizens were subject. Thereafter, in the language of Mr. Justice Steinert of the Washington Supreme Court (R. 48), appellee may not ". . . draw sustenance from its competitor through an assumption of public and governmental functions, to the strangulation of the one with whom it voluntarily competes."

If by reason of its voluntary competition, the city may not exact a license tax of its competitor,

the obstacle to such an exaction is not *per se* in the field of estoppel. The real obstacle is the supreme law of the land. It is the Constitution of the United States. It is the Constitution of the State of Washington. It is the principle contained in the maxim cited in the majority opinion, *salus populi suprema lex*.

The language of the District Court in *Los Angeles Gas & Electric Co vs. City of Los Angeles*, 211 Fed. 912 (affirmed 251 U. S. 32), seems clearly in point:

> "I am, however, also firmly of the belief that until the city, by purchase, appeal to eminent domain, or otherwise, has lawfully and properly and justly eliminated competition, it must meet its competitors as any other private agency would be compelled to meet them, and must stand with them in the same relation to the law, and let its success be measured by its ability satisfactorily to serve the public, rather than by its power through the exertion of public functions to occupy a position of supremacy in the field which it deliberately has chosen to invade."

The City May Not Lawfully Be Witness, Prosecutor, Judge, Jury and Executioner in the Elimination of Its Competitor and in the Appropriation of Its Competitor's Property.

Regardless of legal theories, noble purposes, or alleged friendly gestures, it is impossible to escape

from one definite and certain, although irregular, fact, namely: To permit the city to exact the tax in question of appellant and to exercise the asserted right to examine appellant's books is to decree the destruction of appellant by its competitor. The city creates the facts which operate to bring about such destruction. The city, by exercise of a governmental power to impose an excise tax for revenue purposes, demands tribute of its competitor. The city thereby asserts itself as sole witness, prosecutor, judge, jury and executioner in the elimination of appellant as its competitor. The elimination accomplished, the city in its proprietary capacity becomes appellant's sole beneficiary. There seems to be no principle of social justice yet advanced which countenances such a governmental conscription of private property. Every fundamental principle of fair play, equity, justice and liberty brands such a conscription as a denial of due process of law.

Under the foregoing facts and decisions it is submitted that Seattle Ordinance No. 62,662 in application to appellant, inherently will operate as an oppressive and confiscatory exercise by the city of a governmental power of taxation in aid of its proprietary business; that the application thereof to appellant will unlawfully eliminate appellant as

competitor of the city, will constitute an unlawful and oppressive governmental invasion of the privacy of appellant's business, will result in a spoliation of appellant's business and property, and will constitute an appropriation thereof by the city without compensation, all in contravention of Section 1 of the Fourteenth Amendment. It is further submitted that the inherent constitutional invalidity of the ordinance in its application to appellant is not in any respect cured by the asserted good faith of the city. Nor can such invalidity in any respect be cured by the imposition of a similar tax by the city upon itself.

THIRD: SEATTLE ORDINANCE NO. 62,662 REQUIRES APPELLANT AS A CONDITION PRECEDENT TO THE LAWFUL CONTINUANCE OF ITS BUSINESS IN THE CITY OF SEATTLE TO SECURE AND PAY FOR A LICENSE. THIS REQUIREMENT CONSTITUTES AN IMPAIRMENT OF THE FRANCHISE CONTRACT BETWEEN APPELLANT AND THE CITY IN CONTRAVENTION OF ARTICLE I, SECTION 10, OF THE CONSTITUTION OF THE UNITED STATES.

UNDER PENALTY OF FINE AND IMPRISONMENT THE ORDINANCE PROHIBITS THE CONTINUANCE OF APPELLANT'S BUSINESS IN THE CITY OF SEATTLE UNLESS APPELLANT SECURES AND PAYS FOR A LICENSE.

There is no uncertainty about the requirements of the Seattle ordinance. In Section 3 thereof it is provided:

> "'*Occupation License' Required:* After the first day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained and being the holder of a valid and subsisting license so to do, to be known as an 'Occupation License' . . ."

and it is further provided that—

> "Any taxpayer who engages in or carries on any business subject to tax hereunder without having his 'Occupation License' so to do shall be guilty of a violation of this ordinance for *each day* (italics ours) during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax, or any part thereof, on or before the due date shall be deemed to be operating without having his license so to do."

Under this ordinance it is unlawful for appellant to engage in the light and power business without securing a license. The license required is not

a mere receipt. Unless appellant applies for a license and by paying three per cent of its gross income secures same, appellant may not lawfully continue in business in the City of Seattle.

The penalty for attempting to transact business without the license is severe. Section 24 of the ordinance provides:

> "Section 24. *Penalty:* Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by fine in any sum not to exceed three hundred ($300) dollars, or by imprisonment in the city jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment."

Under this ordinance, if appellant fails to apply for and secure the specified license, it must cease doing business in the City of Seattle. Otherwise, appellant becomes subject to heavy fines and its officers will be sent to jail.

APPELLANT'S FRANCHISE IS A LICENSE FROM THE CITY TO ENGAGE IN AND CONTINUE ITS LIGHT AND POWER BUSINESS IN THE CITY OF SEATTLE UNTIL MARCH 14, 1952.

Appellant by virtue of its franchise contract with the city has a complete and unqualified license

and privilege to "engage in and carry on" the light and power business in the City of Seattle until the expiration thereof. The granting clause of said franchise reads as follows:

> "That there be and hereby is granted to S. L. Shuffleton, his successors and assigns (appellant is his assignee) the right, authority and franchise, *on the conditions and for the considerations in this ordinance expressed, to construct, maintain and operate* equipment and apparatus for an underground electric system, and to erect and maintain poles, wires and appurtenances for the distribution of electric light, heat and power in, over and under the streets, alleys and public places of the City of Seattle. This right, authority and franchise is intended to apply to all streets, alleys and public places of said city, now or hereafter existing, subject to the terms and conditions hereinafter expressed; and said grantee, his successors and assigns, by accepting this ordinance, covenant that within three years from the approval of this ordinance he or they will have *in operation* a system extending to all streets and parts of streets now lighted by electricity."

The term of the franchise is for fifty years, which will expire March 14, 1952.

Section 15 of the franchise ordinance reads as follows:

> "Section 15. *Subject to Repeal or Modification:* This grant is subject to the right of the city council at any time hereafter to repeal, change or modify this grant if the franchise

granted hereby is not *operated* in accordance with the provisions of this ordinance, or at all . . ."

When appellant accepted said franchise and in reliance thereon fully complied with all the requirements thereof by the timely investment of large sums of money in facilities for the manufacture and distribution of light and power in the City of Seattle, appellant thereby acquired from the City of Seattle a vested property right, namely, the right to engage in such business during the entire term of the franchise. By reason of its franchise and the continuous operation of its business thereunder appellant owns the right to transact such business in the City of Seattle. To refrain from destroying or impairing that right is an obligation of the City of Seattle.

By its franchise appellant secured more than a bare permit to place its poles and wires in or under the streets of the city. The franchise is an *operating* franchise. It is a license to *operate*. By its terms it is subject to repeal, change or modification only for failure to *operate* in accordance with the provisions thereof or at all. Under said franchise the burden and duty of *continuous operation* are imposed upon appellant.

Appellant is a public utility company. Its property is dedicated to a public use. It may not cease the transaction of business at will. The City of Seattle may not authorize it to quit business. Nor may the City of Seattle compel appellant to cease doing business in the city unless appellee appropriates appellant's property by an exercise of the power of eminent domain.

Appellant's franchise from the city is a complete and unqualified license to do everything that the city may lawfully license appellant to do so far as "engaging in and carrying on" its light and power business in the city.

The Ordinance Impairs the Obligation of the Franchise Contract.

The ordinance in the case at bar makes it unlawful for appellant to exercise the privilege granted by the franchise contract unless appellant complies with the ordinance requirements. By the ordinance the city would now require appellant to secure a license, to open its private records of customers and accounts to its competitor, and to pay the city annually three per cent of appellant's gross income, all as conditions precedent to the continued lawful exercise by appellant of the rights granted by the

franchise contract. Failure to comply with the ordinance requirements will subject appellant and its officers to penalties of fine and imprisonment. Unless a court is to rewrite the ordinance which the City of Seattle has enacted, there seems to be no escape from the conclusion that in its application to appellant these added requirements constitute an impairment of the obligation of the franchise contract.

The following cases are selected from the many authorities which establish the law upon which appellant relies:

Dartmouth College Case, 4 Wheat. 518;

Pacific Tel. & Tel. Co. vs. Everett, 97 Wash. 259, 271;

Hot Springs Elec. Co. vs. Hot Springs, 70 Ark. 300;

New York Electric Line vs. Empire City Subway Co., 235 U. S. 179;

Los Angeles vs. Los Angeles Gas & E. Corp., 251 U. S. 32, 39.

Unusually pertinent is the language of Mr. Justice McKenna in *Los Angeles vs. Los Angeles Gas & Elec. Corp.*, 251 U. S. 32, 39:

> "A franchise conveys rights, and if their exercise could be prevented or destroyed by a simple declaration of a municipal council, they

would be infirm indeed in tenure and substance. It is to be remembered that they come into existence by compact, having, therefore, its sanction, urged by reciprocal benefits, and are intended and can only be exercised by expenditure of money, making them a matter of investments and property, and entitled as such against being taken without the proper process of law,—the payment of compensation."

Appellant is not here contending against the established law that exemption from taxation is never presumed. *St. Louis vs. United Railways Co.*, 210 U. S. 266; *New Orleans City, etc. Co. vs. New Orleans*, 143 U. S. 192. It is the law that while a state or city by contract may deprive itself of the power to exercise a right *conferred by law to collect taxes or license fees*, such deprivations can only follow when the state or city has concluded itself by the use of unequivocal terms.

In the case at bar, however, appellant's franchise from the city is a *license*. By that franchise the city did unequivocally grant appellant a *license* to engage in its business in the City of Seattle until 1952. The city may not now impair the obligation of that franchise by requiring appellant to secure and pay for another license. When the city granted appellant that franchise it exhausted its power to require appellant during the life of said franchise

to secure from it a license to continue the business authorized thereby. To permit the city now to require appellant to secure and pay $120,000 (or more) annually for a license, before appellant may continue the conduct of the business which the franchise not only authorizes but requires appellant to continuously operate throughout the life thereof, will impair the obligation of the city to appellant under the franchise contract, in contravention of Article I, Section 10, of the Constitution of the United States.

FOURTH: SEATTLE ORDINANCE NO. 62,662 IS REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT THE DEFINITION OF "GROSS INCOME" IN SECTION 2 THEREOF IS VAGUE, INDEFINITE AND UNCERTAIN.

THE ORDINANCE DEFINITION OF "GROSS INCOME" IS SO VAGUE, INDEFINITE AND UNCERTAIN THAT THE TAXPAYER MUST GUESS AT ITS MEANING.

The license fee or tax which the ordinance requires of the appellant (Section 5 (c) thereof) is a fee or tax equal to three per cent of the total "gross

income" of appellant from its "light and power business in the city." The ordinance defines the term "gross income" as follows (Section 2):

> "Section 2: *Definitions:* In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied:
>
> GROSS INCOME: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not), by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein; and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

Is the above definition of gross income clear, definite and certain? Does the word "value" as used in the definition import "cost price," "sale price," or "net profit" on the sale of tangible property or service? Who shall say? How is a taxpayer to know? The answers are not furnished by the ordinance.

What do the words "value proceeding or accruing from the sale of tangible property or service" import? What is the value which proceeds or accrues from the sale of tangible property or services? Is it the gross amount received by the seller or is it the net profit made by the seller from that particular sale? Who is to determine the amount? What rule is to be followed? The ordinance does not furnish the answers.

The word "receipts" as used in the definition expressly excludes receipts or proceeds from the *use* or sale of real property. Appellant is engaged in the electric light and power business. Appellant's equipment of a value of millions of dollars is housed in and to a large part is permanently affixed to buildings which are a part of the realty. Are receipts from that source *pro tanto* to be deducted? Who can determine the proportion of the receipts from any electric light and power business which are not attributable to the use of real property? Who shall say? How is the taxpayer to know? How may the amount be determined? Where in the ordinance may the answers be found?

What is meant by the words "and receipts * * * by reason of the investment of capital in the business engaged in?" Who can determine the amount

of receipts "by reason of the investment of capital" in a light and power business? Who can determine the receipts that are not in any respect due to the investment of capital but are attributable to the variable skill of management and labor, or "the capacity for business of the managers or owners?" *State vs. Express Co.*, 60 N. H. 219-244. The ordinance does not furnish the answers.

What does the phrase "gross income from such business in the city" mean? Does it mean the total amount of money taken in by appellant in the City of Seattle by reason of the investment of capital inside the city limits? If so, it includes large sums of money arising in part by reason of the investment of capital outside the city. Does it mean only the amount received by appellant from its subscribers living inside the city and the exclusion of the receipts derived from subscribers living outside the city, but which receipts are in part the product of capital invested inside the city limits? The ordinance does not furnish the answers.

What proportion of appellant's receipts is attributable to the investment of capital in the City of Seattle? What proportion of these receipts is attributable to the investment of capital outside the City of Seattle? What proportion of these receipts

is attributable to the skill of management and labor? What proportion arises from the use of real property inside and outside the City of Seattle?

It is submitted that only by guessing may any taxpayer engaged in the light and power business determine the amount of the tax imposed by said ordinance. The penalty for a wrong guess is a heavy fine and imprisonment.

AN ACT IN TERMS SO VAGUE THAT MEN OF COMMON INTELLIGENCE MUST GUESS ITS MEANING AND DIFFER AS TO ITS APPLICATION VIOLATES THE FIRST ESSENTIAL OF DUE PROCESS.

There is no uncertainty as to the applicable legal principles. From the many cases available, appellant cites the following:

Connally vs. General Const. Co., 269 U. S. 385;

Champlin Refining Co. vs. Corporation Comm. of Okla., 286 U. S. 210;

International Harvester Corp. vs. Kentucky, 234 U. S. 216, 222;

Collins vs. Kentucky, 234 U. S. 634, 638;

United States vs. Cohen Grocery Co., 255 U. S. 81.

Small Company vs. American Sugar Refining Co., 267 U. S. 233;

Cline vs. Frink Dairy Co., 274 U.S. 445, 455;

Smith vs. Cahoon, 283 U. S. 553;

In re: Di Torio, 8 Fed. (2d) 279, 281;

State ex rel. Crow vs. West Side St. Ry. Co., 146 Mo. 145, 155;

Western Union Telegraph Co. vs. State of Texas, 62 Tex. 630;

State vs. Humble Pipe Line Co., 112 Texas 375; 247 S. W. 1082, 1085.

The rule is clearly stated by Mr. Justice Sutherland in *Connally vs. General Construction Co.*, 269 U. S. 385 at 391, as follows:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of *fair play* and the *settled rules of law*. And a statute which either forbids or requires the doing of an act in terms so *vague* that men of common intelligence must necessarily guess at its meaning and differ as to its application, *violates the first essential of due process of law*."

In *Champlin Refining Co. vs. Corporation Commissioner of Oklahoma*, 286 U. S. 210, 242, Mr. Justice Butler states the rule as follows:

> "The general expressions employed here are not known to the common law or shown to have any meaning in the oil industry sufficiently

definite to enable those familiar with the operation of oil wells to apply them with any reasonable degree of certainty. The meaning of the word 'waste' necessarily depends upon many factors subject to frequent changes. No act or definite course of conduct is specified as controlling and, upon the trial of one charged with committing waste in violation of the act the court could not foresee or prescribe the scope of the inquiry that reasonably might have a bearing or be necessary in determining whether in fact there had been waste. It is no more definite than would be a mere command that wells shall not be operated in any way that is detrimental to the public interest in respect of the production of crude oil. And the ascertainment of the facts necessary for the application of the rule of proportionate production laid down in Section 4 would require regular gauging of all producing wells in each field, a work far beyond anything that reasonably may be required of a producer in order to determine whether in the operation of his wells he is committing an offense against the act.

"In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all. *United States vs. L. Cohen Grocery*, 255 U. S. 81, 89, 41 S. Ct. 298, 65 L. ed. 516, 14 A. L. R. 1045; *Small Co. vs. Am. Sugar Ref. Co.*, 267 U. S. 233, 239, 45 S. Ct. 295, 69 L. ed. 589; *Connally vs. General Construction Co., supra; Cline vs. Frink Dairy Co.*,

274 U. S. 445, 454, 47 S. Ct. 681, 71 L. ed. 1146; *Smith vs. Cahoon*, 283 U. S. 553, 51 S. Ct. 582, 75 L. ed. 1264."

Appellant also quotes the language of Mr. Justice Van Devanter from *Small Co. vs. American Sugar Refining Co.*, 267 U. S. 233, 239:

> "The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases. They have been so construed and applied by other courts in civil proceedings."

This rule has been universally followed in the state courts. It is stated in the following quotation from *State vs. Humble Pipe Line Co.*, 112 Texas 375, 247 S. W. 1082, 1085:

> "In the case last cited (*Western Union Tel. Co. vs. State of Texas*, 62 Tex. 630) Judge Stayton said:
>
> "'It is of the utmost importance, for the protection of the taxpayer, that tax laws should be certain, both as to the thing taxed and as to the amount of the tax, and the manner for its ascertainment; that the taxpayer may have an opportunity, without the expense of litigation,

> to pay such taxes as he may owe; and a tax law which does not accomplish this purpose ought to be held invalid, whether this results from an attempted exercise of power not possessed, through which the law becomes uncertain by both proper and improper subjects being combined, and selected for taxation, or by the failure of the legislature for any other reason to furnish the rules by which taxes may be levied, assessed and collected."

The case of *State ex rel. Attorney General vs. West Side Street Ry. Co.*, 140 Mo. 145, 155; 47 S. W. 959, 961, is directly in point, as is demonstrated by the following quotation therefrom:

> "Upon what gross earnings is the percentage to be computed? A large capital must be invested in the machinery and appliances for conducting a street railway, aside from the tracks laid in the streets. The act seems to contemplate that the bid shall be a percentage only of the receipts derived from the use and occupation of the public property. How is the proper proportion of the gross earnings that should be attributed to the capital invested in the power stations, machinery, etc., to be ascertained? Shall it be by valuing the entire plant, and deducting therefrom the proper valuation of the machinery, and apportioning the gross earnings according to these amounts? If so, how shall this value be fixed and by whom? The act furnishes no answer."

Application of the foregoing legal principles to the ordinance definition of "gross income" war-

raints only the conclusion that the ordinance violates the "first essential of due process of law." The definition of "gross income" is so vague, indefinite and uncertain that it is only possible to guess at its meaning.

CONCLUSION.

Similar appeals of Pacific Telephone & Telegraph Company (No. 364) and Seattle Gas Company (No. 359) are pending in this court. In each of these appeals the validity of said Seattle ordinance No. 62,682 is challenged. Such appeals will probably be heard at the same time this appeal is considered. Each of said companies, as appellant, will file briefs containing points, authorities and arguments against the validity of the ordinance which are applicable to the facts in the instant appeal. If permissible in this court, appellant hereby adopts and asserts each and every applicable point contained in the briefs of said companies, to the end that burdensome reiteration may be reduced to a minimum. This was permitted in the trial court and in the Supreme Court of the State of Washington.

For the several reasons hereinbefore stated, the judgment of the Supreme Court of the State of Washington herein should be reversed.

Respectfully submitted,

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APPENDIX.

THE FACTS AND THE CASES CONSIDERED BY THE SUPREME COURT OF WASHINGTON AS TO EXEMPTION OF THE CITY OF SEATTLE FROM LIABILITY FOR TAX IMPOSED BY ORDINANCE NO. 62,662.

The extent to which Ordinance No. 62,662 is obligatory upon the city in the sense of compelling a general fund contribution from the gross revenues of its light and power business equivalent to the tax exacted from appellant was before the Supreme Court of Washington. As pointed out in the brief, that court held that the validity of the ordinance in its application to appellant must be considered as if no tax or equivalent contribution is exacted from the city.

The considerations which led the Washington Supreme Court to this conclusion, as advanced by appellant in that court, are as follows:

The test of the validity of a law is not what may be done under the law but what is required to be done thereunder:

Coe vs. Armour Fertilizer Works, 237 U. S. 413;

Roller vs. Holly, 176 U. S. 398, 409;

Louisville & N. R. Co. vs. Central Stockyards Co., 212 U. S. 132;

Stuart vs. Palmer, 74 N. Y. 183, 188;

Colon vs. Lisk, 153 N. Y. 188, 194;

State vs. Peterson, 27 Wyo. 185;

12 Corpus Juris, Constitutional Law, Sec. 219, p. 786.

Under the Charter of the City of Seattle (Article VIII, Sec. 9, as amended March 14, 1913), all revenues due to the City of Seattle for electricity sold by its lighting utility must be collected by the city treasurer, and the said moneys are required to be kept by him in a separate fund (R. 6).

The general fund of the city, which is tax supported, is established in Article IX, Section 16, Fourth, of the city charter, which reads as follows:

> "Section 16. *Funds Established and Defined:* The following funds are hereby established:
>
> "Fourth. *General Fund, Accounts:* The general fund, into which shall be paid all revenues of the city, except as otherwise provided by law, and from which shall be paid all expenses and liabilities of the city which are not payable out of special funds . . ."

Transfer of money from one fund of the city to another may not be made, except as provided in

Article IX, Section 17, of the Seattle charter (R. 6), which reads:

> ". . . No transfer shall be made from one fund to another except as otherwise provided in this charter, unless by an affirmative vote of a majority of the members elected of the city council by ayes and noes recorded in the journal of proceedings . . ."

Under Article IX, Section 6, of the city charter (R. 6), the city treasurer may "not pay out any moneys belonging to the city except upon legal demands, allowed and audited in the manner prescribed in this charter or by law."

The duties of the treasurer are specified, in Article IX, Section 7 (R. 6), as follows:

> "It shall be the duty of the city treasurer to receipt for the moneys of the city and to pay out the same *only on warrants* drawn in pursuance of the *order of the city council* and signed and registered by the city comptroller . . ."

The City of Seattle, being a city of the first class, is subject to the requirements of the Washington budget law (Remington's Revised Statutes, Sec. 9000-13). Under this law the estimated expenditures of each department and the estimated revenues of the city for the ensuing year are submitted to the council. Public hearings for the pur-

pose of giving any person interested a chance to be heard are required. The council may not increase the total amount allowed to each department in the preliminary estimate of the expenses of the department submitted by the head thereof (R. 7).

After the public hearing, and after the council has made such changes in the estimates as it may make, the law requires that the budget be then, on or before the first Monday in October, adopted by the council as the final budget for the succeeding year. "Each and every city official and employe" is limited in the making of such expenditures and in the incurring of liabilities "to the amounts of such detailed budget," except as otherwise provided in Section 9000-19 (Remington's Revised Statutes).

Under the last-mentioned section of the state law machinery is provided for the creation of an emergency fund. Upon the occurrence of certain specific catastrophes or emergencies not here pertinent, or to "meet *mandatory* expenditures required by laws enacted since the last budget was adopted, the council may, by an ordinance passed by three-fourths of all its members, authorize the expenditure of sufficient money from the emergency fund to meet the expenses or obligations so caused or imposed."

The ordinance does not *require* payment of the tax by the City of Seattle. The only pertinent provision of the ordinance is that "*so far as permitted by law*" Subdivision (c) of Section 5 of the ordinance shall be applicable to the City of Seattle, but the city "shall not as a taxpayer be required to conform to the other provisions of this ordinance."

The ordinance does not specify that the City of Seattle *shall pay* the tax. If the city fails to pay itself the tax, how may payment be enforced? By whom? Against whom?

The ordinance does not *require* the city to pay the tax out of the revenues received by it from its electricity customers. It would be perfectly consistent with the ordinance for the city to pay said tax out of its general fund. (Seattle Charter, Article IX, Section 16, *supra*.)

The ordinance does not *require* any officer or employe of the city to make a return of the gross revenues received by the city from its electricity customers.

The ordinance does not *authorize* any city officer to draw a warrant for payment of the tax.

The ordinance does not *require* the city to collect from its electricity customers the additional amount necessary to enable it to actually add to the revenue of the city the sum required to pay the tax.

In the Seattle budget for 1932 there is no item included which would permit the lawful payment of the tax by the city for any part of the year 1932. No provision for the payment of the 1932 tax may be made out of any emergency fund until the city council so directs by an ordinance passed by three-fourths of its members, and even if there be money in the emergency fund that fund in the Seattle 1932 budget is one item of the general fund. The total revenues of the city's light fund are by the 1932 budget wholly consumed by the items therein included. From what source is it possible for the city to lawfully take the money necessary to pay itself the 1932 tax?

All revenue collected by the City of Seattle from its electricity customers must be placed in the city light fund. (Seattle Charter, Article VIII, Section 9.) Such funds may not be transferred to any other fund of the city "*unless by an affirmative vote of a majority of the members elected of the*

city council by ayes and noes reported in the journal of proceedings."

Future affirmative legislative action by a majority of the members of the city council is required before any lawful transfer of any funds from the city light fund to the city general fund may be made. Such future affirmative legislative action will be required before the city may even pay itself the tax specified in the ordinance for the year 1932 or for any year subsequent thereto. What court can compel such legislative action? If the city council in good faith intended to require the city to pay itself the amount of the tax provided in the ordinance, it would have enacted an ordinance in form far different from the form of the ordinance under attack.

The city is not subject to any of the penalties of the ordinance.

The money received by the city from its electrical energy business is owned by the city in no different capacity from that in which the city owns the money which is in its General Fund. If there be a surplus of $100,000 in the City Light Fund, that $100,000 belongs to the City of Seattle. It may use it as it pleases. It may reduce its rates; it may

expend it for plant improvements; it may place it in the General Fund. Whatever may be the machinery by which it is done or the purpose of the transfer, the fact is that a transfer by the City of Seattle of money from its City Light Fund to its General Fund (if the ordinance did make such a transfer obligatory, which appellant denies), would constitute nothing more than an idle gesture—a mere bookkeeping transaction. In its true operation and effect it would mean absolutely nothing. The city would be merely taking money which it already owns out of one of its pockets and placing it in another of its pockets. The city would only be tipping itself.

Annually from the General Fund of the city there is transferred to the City Light Fund of the city several hundred thousand dollars (in 1932 it was in excess of $438,750) in payment for electrical energy furnished by the city to the city for the purpose of lighting the city streets and other municipal purposes. The rate at which this energy is sold by the city to the city is fixed and determined by appellee's city council. No bids are received. There is no competition as to such business. There is no legal limit to the amount of money that may be thus transferred from the city's General Fund to

its City Light Fund. If the city should go through the motion of transferring $100,000 a year from its light fund to its general fund for the purpose of ostensibly paying the tax, such a transfer could be nothing more than an idle gesture. It would in no respect constitute payment in fact. A slight increase in the rate the city agrees to pay itself for the energy it buys from itself will effectively bring back from the general fund to "City Light" the full amount ostensibly paid by appellant's competitor as the revenue license tax specified in the ordinance (R. 31).

The first revenue bonds issued by the city in connection with the development of its lighting utility were issued in 1917. The total amount of such revenue bonds which were outstanding on December 31, 1931, was approximately $32,852,000 (R. 6).

These revenue bonds have been issued under authority granted by the legislature of the State of Washington. (Sec. 9491, Remington.) They are obligations only against the special fund created and established in Section 5 of each of the various ordinances authorizing the issuance of the bonds. Under the provisions of each of said ordinances

there is created a special fund to be called "Municipal Light Extension Bond Fund ....." The special fund for each issue is designated by including after the word "Fund" in the name, the year in which the particular issue is authorized. The special fund thus designated is to be "drawn upon for the sole purpose of paying the interest, or the principal and interest, of said bonds." Thirty days prior to the respective dates on which interest, or principal and interest, of said bonds becomes due the city treasurer is required to pay into the special fund *"certain fixed amounts of the gross revenues of"* the city owned lighting utility, equivalent to the respective amounts of interest, or principal and interest, so falling due upon any and all of the bonds then outstanding (R. 6).

The *gross revenues* of the city from its lighting utility are pledged to such payments, "which shall constitute a charge upon such revenues *prior and superior to all other charges whatsoever, including charges for maintenance and operation.* . . . ".

The city is by each of the ordinances obligated "to establish from time to time and maintain such rates for electric energy as will provide sufficient

revenues to permit the payment of said sums into such special funds, which the city is pledged to set aside for the payment of principal and interest, as herein provided, to be applied to the payment of the principal and interest of the bonds herein authorized, until such bonds shall have been paid in full, and in addition thereto all costs of operation and maintenance . . ."

With such positive prior pledge of the *gross revenues* of its lighting utility, a pledge thereof "prior and superior to all other charges whatsoever," the Seattle city council is wholly without power or authority to *legally* require a diversion of three per cent of said gross revenues to the general fund of the city for the purpose of paying the tax in question. The most that the city council may lawfully do in the premises (and even this it has not done) would be to obligate the city to make such a transfer and payment, if, when and as there may be sufficient gross revenues from the lighting utility to satisfy the prior pledge thereof to the payment of the bond interest and principal as same become due, and the costs of maintenance and operation, and a surplus in excess thereof sufficient to permit the payment of the tax prescribed by the ordinance under discussion. The uncertainty of any

such surplus, particularly since the ordinance does not require the city to collect the additional revenues needed to pay the tax from the customers, clearly indicates that the attempt to make the ordinance applicable to the City of Seattle was, is and can be only an idle gesture. Certainty in the obligation on the part of the city to pay is essential. An obligation only to pay if there is anything available to use for money is insufficient.

A binding legal obligation, under penalty of $300.00 a day and imprisonment for failure to meet it, placed upon the privately owned utility is not equaled by an expression of the city council of a willingness to pay if there is anything left with which to pay, after payment of prior lawful pledges made by council of the only funds from which the tax may be lawfully paid by the city.